SOUTHERN ESTATE SDN. BHD. & ANOR.

v.

TRACTORS MALAYSIA BHD.

COURT OF APPEAL, KOTA KINABALU
TAN SRI DATO' LAMIN MOHD. YUNUS PCA
DATO' MAHADEV SHANKAR JCA
DATO' AHMAD FAIRUZ DATO' SHEIKH ABDUL HALIM JCA
[CIVIL APPEAL NO: S-02-198 OF 1994]
6 AUGUST 1996

CIVIL PROCEDURE: *Fraud - Standard of proof - Fraudulent misrepresentation - Action for damages - Whether proof beyond reasonable doubt - Whether proof on a balance of probabilities.*

EVIDENCE: *Standard of proof - Fraud - Fraudulent misrepresentation - Action for damages - Standard of proof required.*

CONTRACT: *Hire purchase - Fraudulent misrepresentation - Action for damages - Standard of proof required.*

HIRE PURCHASE: *Hire purchase agreement - Whether hire purchase agreement or hire agreement - Whether alleged fraudulent misrepresentation proven.*

CIVIL PROCEDURE: *Res judicata - Res judicata by way of issue estoppel - Res judicata by way of cause of action estoppel.*

CIVIL PROCEDURE: *Res judicata - Exceptions - Whether special circumstances existed.*

In 1969, Tractors Malaysia Bhd. ('the respondent') filed a suit ('CSN189/69') against Southern Estate Sdn. Bhd. ('the 1st appellant') claiming the sum of RM2,052,976.68 being money due and owing under 19 hire agreements ('the 19 agreements') in respect of machinery supplied on hire. Additionally, the respondent also claimed the sum of RM245,641.07 for parts supplied and services rendered. The first appellant filed a defence admitting liability to the extent of RM959,896.92, and a judgment therefor was entered in December 1969.

Concurrently, the respondent also sued ('CSN190/69') the second appellant for the sum of RM1,978,933.36 under a guarantee agreement by which the second appellant had guaranteed the repayment of the debts emanating from the 19 agreements. The second appellant admitted liability and a judgment for the sum of RM718,266.85 was entered in December 1969. Subsequently, the respondent commenced execution proceedings against the second appellant by issuing a prohibitory order against his lands. The second appellant then filed a writ in

1972 ('CSN199/72') seeking, *inter alia*, to set aside the order granting leave to enter final judgment as well as the prohibitory order; for declarations that the final judgment entered be set aside and that the guarantee agreement was null and void for lack of consideration; and for damages for fraudulent misrepresentation. The High Court struck out the second appellant's suit but the Federal Court allowed his appeal. On further appeal to the Privy Council, the Federal Court's decision was reversed and the decision of Lee Hun Hoe J in the High Court was restored.

Dissatisfied, the appellants filed an action against the respondent in 1978, alleging fraudulent misrepresentation in respect of the 19 agreements. They sought, *inter alia*, the rescission of the 19 agreements and damages for fraudulent misrepresentation. The appellants submitted that the standard of proof in an action for damages for fraud is the civil standard of a preponderance of probability, and that this standard even varies according to the gravity of the allegations to be proved. The respondent submitted that the matters or issues contained in the appellants' statement of claim were *res judicata*; it also denied the allegation of fraud. The High Court found for the respondent and the appellants appealed.

Held:

Per Lamin Mohd. Yunus PCA (delivering the judgment of the Court):

[1] The standard of proof of fraud in Malaysia is proof beyond reasonable doubt. In the instant appeal, the appellants had failed to establish fraudulent misrepresentation on the part of the respondent beyond reasonable doubt.

[2] The appellants could have raised the issue of fraudulent misrepresentation in CSN189/69 and/or CSN199/72. Their failure to do so then must mean that they are estopped from raising it now. Consequently, *res judicata* applied to the instant appeal.

[Appellants' appeal dismissed]

[Appeal from High Court Borneo, Kota Kinabalu; Civil Suit No: 190 of 1978]

***[Bahasa Malaysia** Translation of Headnotes]*

***PROSEDUR SIVIL:** Fraud - Standard bukti - Salah-nyata fraud - Tindakan untuk gantirugi - Samada bukti di luar keraguan yang wajar - Samada bukti atas imbangan kebarangkalian.*

***KETERANGAN:** Standard bukti - Fraud - Salah-nyata fraud - Tindakan untuk gantirugi - Standard bukti diperlukan.*

***KONTRAK:** Sewabeli - Salah-nyata fraud - Tindakan untuk gantirugi - Standard bukti diperlukan.*

SEWABELI: *Perjanjian sewabeli - Samada perjanjian sewabeli atau perjanjian sewaan - Samada salah-nyata fraud bukti.*

PROSEDUR SIVIL: *Res judicata - Res judicata melalui isu estopel - Res judicata melalui kuasa tindakan estopel.*

PROSEDUR SIVIL: *Res judicata - Kekecualian - Samada keadaan-keadaan yang khas wujud.*

Dalam tahun 1969, Tractors Malaysia Bhd. ('responden tersebut') telah memfailkan satu guaman ('CSN189/69') terhadap Southern Estate Sdn. Bhd. ('perayu pertama tersebut') menuntut jumlah sebanyak RM2,052,976.68 yang merupakan wang yang kena dibayar dan terhutang di bawah 19 perjanjian sewaan ('19 perjanjian tersebut') bagi jentera yang dibekalkan atas penyewaan. Tambahan pula, responden tersebut juga menuntut jumlah sebanyak RM245,641.07 bagi alat-alat ganti yang dibekalkan dan perkhidmatan yang telah diberikan. Perayu pertama telah memfailkan satu pembelaan mengakui tanggungan sehingga kepada had sebanyak RM959,896.92 dan satu penghakiman berhubung dengannya telah dimasukkan dalam bulan Disember 1969.

Serentak dengan itu, responden tersebut juga telah mendakwa ('CSN190/69') perayu kedua bagi mendapatkan jumlah sebanyak RM1,978,933.36 di bawah satu perjanjian gerenti melalui yang mana perayu kedua telah menggerentikan pembayaran balik hutang-hutang yang berpunca daripada 19 perjanjian tersebut. Perayu yang kedua telah mengakui tanggungan dan satu penghakiman bagi jumlah sebanyak RM718,266.85 telah dimasukkan dalam bulan Disember 1969. Berikutan itu, responden tersebut telah memulakan prosiding pelaksanaan terhadap perayu kedua dengan mengeluarkan satu perintah larangan terhadap tanah-tanahnya. Perayu kedua kemudiannya telah memfailkan satu writ dalam tahun 1972 ('CSN199/72') memohon, antara lainnya, untuk mengenepikan perintah yang memberikan kebenaran untuk memasukkan penghakiman muktamad dan juga perintah larangan tersebut, untuk mendapatkan pengisytiharan bahawa penghakiman muktamad yang telah dimasukkan hendaklah diketepikan dan bahawa perjanjian gerenti tersebut adalah batal dan tak sah kerana ketiadaan pertimbangan; dan untuk gantirugi bagi salah-nyata fraud. Mahkamah Tinggi menolak permohonan perayu kedua tetapi Mahkamah Persekutuan membenarkan rayuan perayu kedua. Atas rayuan yang selanjutnya kepada Majlis Privi, keputusan Mahkamah Persekutuan tersebut telah diakas dan keputusan Hakim Lee Hun Hoe dalam Mahkamah Tinggi telah dihidupkan semula.

Berasa tidak puas hati, perayu tersebut telah memfailkan satu tindakan terhadap responden tersebut dalam tahun 1978, mendakwa salah-nyata fraud berhubung dengan 19 perjanjian tersebut. Mereka memohon, antara lainnya, pembatalan 19 perjanjian tersebut dan gantirugi bagi salah-nyata fraud. Perayu-perayu tersebut berhujah bahawa standard bukti dalam sesuatu tindakan untuk gantirugi

bagi fraud adalah standard sivil kebarangkalian, dan bahawa standard ini juga berubah-ubah menurut graviti pengataan yang hendak dibuktikan. Responden tersebut telah berhujah bahawa perkara-perkara atau isu-isu yang terkandung dalam pernyataan perayu-perayu tersebut adalah *res judicata;* ianya juga menafikan pengataan fraud. Mahkamah Tinggi telah membuat keputusan memihak kepada responden dan perayu telah merayu.

Diputuskan:

Oleh Lamin Mohd. Yunus PMR (menyampaikan penghakiman Mahkamah):

[1] Standard bukti fraud di Malaysia adalah bukti di luar keraguan yang wajar. Dalam rayuan semasa ini, perayu-perayu tersebut telah gagal untuk menentukan salah-nyata fraud pihak responden di luar keraguan yang wajar.

[2] Perayu-perayu tersebut boleh membangkitkan isu salah-nyata fraud dalam CSN189/69 dan/atau CSN199/72. Kegagalan mereka untuk berbuat sedemikian tentunya bermakna mereka telah diestopel daripada membangkitkannya. Akibatnya, *res judicata* terpakai kepada rayuan semasa ini.

[Rayuan perayu-perayu telah ditolak]

Cases referred to:
Hornal v. Neuberger Products Ltd. [1957] 1 QB 247 ***(not foll)***
Saminathan v. Papa [1981] 1 MLJ 121 ***(foll)***
Arnold v. National Westminster Bank plc. [1991] 3 All ER 41 ***(refd)***
Asia Commercial (M) Bhd. v. Kawal Teliti Sdn. Bhd. [1995] 3 CLJ 783 ***(refd)***

For the appellant - B.E. Teh & Anuar Ghani; (M/s. Anuar Ghani & Assoc.)
For the respondent - Norbert Yapp; (M/s. Jayasuriya Kah & Co.)

JUDGMENT

Lamin Mohd. Yunus PCA

Before hearing the appeal proper, learned Counsel for the plaintiffs/appellants informed the Court that he wished to withdraw his motion dated 7 January 1995 in which he applied for a stay of execution of the judgment obtained on 27 December 1969 in respect of the Civil Suit No: 190 of 1969 and stay of the public auction due to take place on 14 January 1995 on the grounds that the land had been auctioned and therefore it was already academic. Accordingly the motion was struck out.

Now the present appeal has some historical background which began with the filing of Civil Suit No: 189 of 1969 in the High Court of Kota Kinabalu, Sabah in October 1969 by Tractors Malaysia Bhd. ('TMB') against Southern Estate

Sdn. Bhd. ('Southern Estate') claiming for the sum of RM2,052,976.68 being moneys due as a result of three months in default payment under 19 hire agreements entered into between TMB and Southern Estate on l October 1967. The 19 hire agreements were in respect of 19 units of machinery such as tractors supplied on hire by TMB to Southern Estate for the purpose of carrying out timber logging operations including the costs of their repossession. In that suit TMB also claimed the sum of RM245,641.07 in respect of tractor parts supplied and services rendered to Southern Estate. Southern Estate filed a defence admitting liability to the extent of RM959,896.92 in which judgment was entered on 27 December 1969.

At the same time TMB took out another writ in the same High Court *vide* Civil Suit No: 190 of 1969 against the director and owner of Southern Estate, Tio Chee Hing, suing him as guarantor under a guarantee agreement dated 21 November 1968 for the sum of RM1,978,933.36. The agreement was for Tio to guarantee the repayment by Southern Estate it's debts arising out of the 19 hire agreements and TMB was to forbear from suing Southern Estate for the recovery of the debts on the following conditions:

> 2. No demand to the guarantor for the immediate full payment of the debt shall be made so long as the guarantor complies with each and every one of the following conditions:
>
> (3) At the request of the company the guarantor shall execute a charge or a second charge as the case may be in respect of all lands owned by the guarantor and shall cause the hirer to execute a charge or a second charge as the case may be in respect of all lands owned by the hirer subject in every case to any consent that may be required of any charges and pending the execution of such charges the guarantor shall not and undertakes to ensure that the hirer shall not create new or further charges in respect of the lands owned by them respectively without the consent of the company provided that the provisions of this paragraph shall not apply to the lands comprised in the guarantor's New Town Project at Lahad Datu;
>
> (5) The guarantor shall pay monthly to the company towards the discharge of the debt as aforesaid the sum of RM50,000 (fifty thousand dollars), the first payment to be made on the 15 March 1969 and thereafter on the first day of each succeeding month.

Tio admitted liability and judgment was entered on the same date i.e., 27 December 1969 for the sum of RM718,266.85. Subsequently TMB commenced execution proceedings against Tio by issuing a prohibitory order against his lands. On 16 May 1972 Tio filed a writ in Civil Suit No: 199 of 1972 against TMB and sought *inter alia* to set aside the order granting leave to enter final judgment dated 27 December 1969 in Civil Suit No. 190 of 1969 and the prohibitory order. Tio further prayed for two declarations namely that the final judgment entered be set aside and that the guarantee agreement was

null and void for lack of consideration. Tio also claimed damages for fraudulent misrepresentation. TMB successfully applied to the High Court to have the Suit No: 199 of 1972 struck out on the ground that in the words of the learned Judge, Lee Hun Hoe J (as he then was): (His Lordship's unreported judgment at p. 111 of respondent's bundle of authorities):

> The Court will not allow itself to be used as a vehicle to defeat the course of justice in the hope of delaying the execution of a judgment and saving a grandiose project.

Tio appealed to the then Federal Court which allowed his appeal. TMB took up the matter further by going up to the Privy Council. The Privy Council reversed the decision of the Federal Court and restored Lee Hun Hoe J's decision.

Not satisfied with the decision of the Privy Council, Tio and Southern Estate filed the present action against TMB on 2 March 1978. In this action TMB was alleged to have fraudulently induced Southern Estate to enter into the same 19 Hire Agreements. The alleged fraudulent misrepresentation was said to have emanated from three letters. (They appear from pp. 149 to 155 of the appeal record.) In paras. 16 and 17 of the statement of claim the plaintiffs (Southern Estate and Tio) alleged:

> 16. The plaintiffs for many years acted without knowledge of the said fraud of the defendants and the second plaintiff brought proceedings in the High Court at Kota Kinabalu in Civil Suit No: 199 of 1972 against the defendants to set aside the judgment obtained against him in Civil Suit No: 190 of 1969. The said proceedings in Civil Suit No: 199 of 1972 were however unsuccessful.
>
> 17. The plaintiffs have since discovered the fraud sometime in June 1977.

As a result, they claimed that they had suffered damages and they therefore sought *inter alia*:

> (a) the rescission of the 19 agreements;
>
> (b) damages;
>
> (c) the orders made in Civil Suits Nos: 189 of 1969 and 190 of 1969 be set aside; and
>
> (d) the memorandum of charge in respect of their lands be cancelled and expunged from the Register of the Land Office.

In their statement of defence dated 24 April 1978, TMB denied the allegation of fraud or fraudulent misrepresentation and contended that the matters or issues contained in the statement of claim were *res judicata* and that the plaintiffs are estopped from taking the present action.

At the conclusion of the plaintiffs' case in the Court below i.e., of the present suit (now on appeal before us), TMB's Counsel made a submission of no case to answer.

The learned Counsel for the appellants submitted on the legal standard of proof on fraudulent misrepresentation and attempted on facts to show how TMB led his clients to believe that they had entered into hire purchase agreements and not hire agreements. The learned Counsel cited textbook writers and the English case of *Hornal v. Neuberger Products Ltd.* [1957] 1 QB 247 in order to show the standard of proof required in the case of fraud. In *Hornal*, it was decided that in an action for damages for fraud, the standard of proof is the civil standard of a preponderance of probability and that too was not an absolute standard for the degree of probability which a Court requires might vary according to the gravity of the allegations to be proved.

In Malaysia, the standard of proof required to prove fraud is well-settled as illustrated in the case of *Saminathan v. Papa* [1981] 1 MLJ 121. In this case the respondent (Miss Papa) filed a suit in the High Court below for a declaration that she was the registered proprietor of a piece of land and prayed for vacant possession and other reliefs. Her claim was dismissed by the trial Judge and she appealed to the Federal Court and her appeal was allowed. Saminathan, the appellant appealed to the Privy Council and his appeal was dismissed.

When the appeal came before the Federal Court, the then Lord President, Tun Suffian had this to say:

> Now as to the law, it is clear from s. 340 of the National Land Code that the plaintiff's title to the land in dispute is indefeasible, but it may be defeated in case of fraud or misrepresentation to which she was a party or where the registration was obtained by means of an insufficient or void instrument.
>
> As the plaintiff's name is on the register and the defendant wanted it removed, in my judgment the burden is on the defendant to prove fraud or misrepresentation to which the plaintiff was a party or that the registration of the plaintiff as proprietor was obtained by means of an insufficient and void instrument.
>
> As regards fraud, the defendant must prove it not on a balance of probabilities but **beyond reasonable doubt**: see the Privy Council case of *Narayanan.*

The Federal Court found that Saminathan had failed to satisfy the Court beyond reasonable doubt that Miss Papa was guilty of fraud. On appeal to the Privy Council, Lord Diplock delivering the judgment of the Board confirmed the standard of proof to be applied and said:

> Only one allegation of fraud was made in Saminathan's pleading *viz* that Miss Papa had misrepresented to the Collector of Land Revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial Judge's judgment which suggests that he found this allegation proved but Counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the Collector. **The onus of proof of fraud in Malaysia is proof beyond reasonable doubt**. In the circumstances the Federal Court were clearly entitled, if not bound, to reject as they did the Judge's finding on this matter.

In the present appeal before us the learned Counsel for the respondent contended that the issues in this appeal are basically questions of fact. We agree. In para. 22 of his written judgment, the learned Judge made his findings of fact thus:

> With respect on the evidence before me as a whole, in its totality I find plaintiffs' allegation of fraud, fraudulent misrepresentation against the defendants is second plaintiff's mere averment, oral evidence, vacillatory at times, not borne out, not supported by PBD 8, PBD 11 and PBD 13, plaintiff's own documentary evidence.

In paras. 3 and 5 of their statement of claim, the plaintiffs alleged:

> 3. In order to induce the plaintiffs to make the alleged contracts, the defendants had orally as well as in writing represented to the plaintiffs that the 19 units of logging equipment were sold to them on hire purchase terms as hereinbefore mentioned.
>
> 5. In truth and in fact the representations were false and untrue in that the 19 contracts turned out to be hiring agreements with unconscionable terms.

We note that in each of the five agreements (only five of 19 agreements were produced as exhibits) clause 1 clearly provides that the owners (i.e. TMB) "shall let" and the hirer (i.e. Southern Estate) "shall take on hire." In the guarantee agreement of 21 November 1968 in which the second plaintiff (Tio Chee Hing) as the guarantor guaranteed the "debts" in respect of the 19 agreements and the preamble therein states:

> Whereas at the request of the guarantor the company **let on hire** to the Southern Estates Sdn. Bhd. ... .

There was no mistake at all as to the status of all the logging equipment under the 19 agreements. They were "let on hire." Whereas two of the three letters talk about the terms in the nature of "Hire Purchase Terms" namely those of 7 January 1967 (PBD 8) and 10 July 1967 (PBD 13) and they both refer to the Bintulu project. The other letter of 24 February 1967 (PBD 11) talks about aspects of delivery of the machinery also for the Bintulu project. Whereas the present case relates to the Lahad Datu project. Two of the letters (PBD 11 and PBD 13) were clearly directed to Tio (2nd appellant) himself. He cannot come now to say that he did not understand their contents in that they were meant for the Bintulu project.

The learned Counsel for TMB (the respondent) submitted that the present case related to projects in Lahad Datu whereas the three letters referred to those in Bintulu. Very clearly the letters talk about the machine requirements for Bintulu Area Timber Concession. In fact two of the letters are headed "Bintulu Area Timber Concession." In examination-in-chief the second plaintiff admitted that there was a project in Bintulu, another timber concession of 96,900 acres. No doubt it was obtained by Southern Timber Contractor and not Southern Estate but Southern Timber Contractor was solely owned by him. Whereas in clause 4 of each of the 19 agreements it is clearly stated that the Hirer (i.e. Southern Estate) "will keep the said machinery safely and properly housed at Lahad Datu" and "will not remove the same without the previous consent in writing of the owners". Obviously the machinery and equipment were meant to be used in Lahad Datu. In his evidence before the Court, he agreed that he ordered 25 units and upon delivery 19 units were used in Sabah meaning Lahad Datu and six units were sent to Bintulu. He also agreed that he signed all the 19 separate agreements. While the six other agreements in respect of the six machinery that were sent to Bintulu he admitted that they were signed in Bintulu by the person in charge of Southern Timber Contractor.

The learned Counsel for the respondents, Mr. Yapp, contended that the appellants had failed to establish fraudulent misrepresentation on the part of the respondents. The present case related to a project in Lahad Datu. Whereas the three letters concerned the project in Bintulu. In cross-examination before the trial Judge the second appellant admitted that there was such a project in Bintulu. The terms of the transaction for the Bintulu project are clearly spelt out in at least two of the letters. In cross-examination before the trial Judge, the second appellant attempted to contradict the terms contained in the letter of 7 January 1967 (PBD 8). This was dealt with by the trial Judge as can be seen from his grounds of judgment at p. 17 paras. 23 and 24.

The defence (TMB) pleaded in the alternative *res judicata* and on this subject we were referred to a couple of cases one of which was *Arnold v. National Westminster Bank plc*. [1991] 3 All ER 41. The House of Lords explained in detail the concept and issues involved especially on the distinction between the cause of action estoppel and issue estoppel. In this case the lessees commenced proceedings seeking rectification of the lease and a determination as to the true construction of the rent review clause on the ground that subsequent cases had shown that the Judge's construction of that clause to be wrong. The landlords applied to strike out the claim on the ground that there was an issue estoppel between the parties which prevented the lessees from relitigating the matter. The application was dismissed by the Court below on the ground that a subsequent change in the law was capable of bringing the case within the exception to the doctrine of issue estoppel. The landlords' appeal to the Court of Appeal was dismissed. The landlords' subsequent appeal to the House of Lords was again dismissed. Lord Keith of Kinkel (at p. 52) had this to say:

Upon the whole matter I find myself in respectful agreement with the passage in the judgment of Sir Nicolas Browne-Wilkinson V-C where he said ([1988] 3 All ER 977 at 983 [1989] Ch 63 at 70-71):

> In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which in fact he does not possess. I can, therefore, see no reason for holding that a subsequent change in the law can never be sufficient to bring the case within the exception. Whether or not such a change does or does not bring the case within the exception must depend on the exact circumstances of each case.

I am satisfied, in agreement with both Courts below, that the instant case presents special circumstances such as to require the respondents to be permitted to reopen the question of construction decided against them by Walton J, that being a decision which I regard as plainly wrong.

The appeal before us arose out of an action filed by both appellants in the High Court Kota Kinabalu on 3 April 1978 against TMB. It was a suit claiming *inter alia* for the rescission of the 19 agreements and for the judgment entered into by TMB against both appellants in Civil Suit No: 189 of 1969 and Civil Suit No: 190 of 1969 and all subsequent orders and execution issued thereunder be set aside. On 28 October 1969 TMB sued Southern Estate (the first appellant) for non-payment of rental under the same 19 agreements *vide* Kota Kinabalu High Court Civil Suit No: 189 of 1969. On the same day TMB filed a suit *vide* Kota Kinabalu High Court Civil Suit No: 190 of 1969 against Tio Chee Hing (second appellant) under the guarantee agreement of 21 November 1968 for failure to settle the sum due under Civil Suit No: 189 of 1969 arising out of the 19 agreements. It is quite clear from the evidence of the second appellant (Tio), that he could have raised the issue regarding the 19 agreements not being hire purchase agreements when the Civil Suit No: 189 of 1969 was filed. He could also have raised it in Civil Suit No: 199 of 1972. The appellants' failure to do so must have the effect that they are now estopped from raising it. The Counsel for the respondents contended that the appellants also failed to show special circumstance as in *Arnold's* case so as to bring the present case within the exception so that the appellants would not be estopped from raising the same issues. Accordingly he submitted the case would be *res judicata* by way of issue estoppel. Also he contended that on the authority of *Asia Commercial (M) Bhd. v. Kawal Teliti Sdn. Bhd.* [1995] 3 MLJ 189; [1995] 3 CLJ 783 the doctrine of *res judicata* by way of *per rem judicatum* (i.e. cause of action estoppel) applies as the parties in the present suit were the same as in the other two suits namely Civil Suit Nos: 189/69 and 190/69 and in respect of the same matters.

After hearing submissions from both sides we unanimously found that *res judicata* applied and if we were wrong in this, the appeal must also fail on the ground that fraudulent misrepresentation had not been established beyond reasonable doubt. Accordingly we dismissed the appeal with costs. As Mr. Yapp informed us that he wished to withdraw his cross-appeal we therefore struck out the cross-appeal.

Reported by Gan Peng Chiang